In the

United States Court of Appeals

For the Ninth Circuit

ROBERT F. ELLISON and
CLEO A. (ELLISON) WALKER, *Appellants,*

v.

WILLIAM E. FRANK, United States District Director of Bureau of Internal Revenue for the State of Washington and the Territory of Alaska, *Appellee.*

NO. 15318

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the Western District of Washington, Southern Division.

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INTRODUCTION

The statement of the case in Appellee's Brief consists in its major portion of excerpts from selected portions of the Department of Agriculture, Forest Service agreement, (Ex. 2), the written agreement between Northwest Door Company, Vancouver Plywood and Veneer Co., and Robert F. Ellison, (Ex. 3), together with a very limited selection of portions of the testimony of certain witnesses and that part of the findings and con-

clusions of the lower Court which supported the Appellee's position in this case (Appellee's Br. 3-14).

The theory upon which this case was tried by the Appellee was that ownership of the timber on the Green Forks tract and of the contract right to cut that timber was determinable solely from two written instruments, (Ex. 2 and 3 herein), and that oral testimony was inadmissible to explain, vary, change, or construe the transaction between the parties as reflected by the writings. The defendant stated this was the theory of his case and was granted a continuing objection to the admission of any oral testimony regarding these writings (R. 36, 49). Appellant, on the other hand, insisted throughout on the admissibility and relevance of the parol testimony. The Court admitted the testimony, subject to the objection, and reserved his ruling on its admissability (R. 50).

Appellee's statement of the case is correct only if his contention that parol evidence is inadmissible can be supported; otherwise his statement is out of context with the record considered in its entirety.

SUMMARY OF APPELLEE'S ARGUMENT

The Appellee's argument is based upon three basic premises:

1. The lower Court considered the testimony of the witnesses and that the parol evidence submitted supports the Trial Court's findings (R. 22, 23).

2. Appellee implies that the Appellants' contention that the contract right to cut the timber had been assigned to him and that equitable title to the timber and the logs obtained therefrom was a sham (Appellee's Br. R. 20, 21).

3. Ellison was not the assignee of Northwest and the owner of the right to cut the timber and had no interest in the logs obtained therefrom (Appellees B. 27, 28).

SUMMARY OF APPELLANTS' REPLY

I

THE POSITION ADOPTED BY THE APPELLEE IN HIS BRIEF IS DIRECTLY CONTRARY TO THE POSITION ADOPTED BY THE APPELLEE IN THE LOWER COURT.

At the trial of the case, the Appellee announced his theory of the case to be "that title and all of the rights of the parties are established in writing and that there isn't any occasion for (the admission of) any testimony to construe" (R. 36). The Appellee stated that it was his intention to hold (the Appellants' case) very narrowly within documents and that he was going to object to any attempt to widen the issue beyond what the documents themselves contend (R. 49). The Appellee was granted an objection continuing throughout the

trial to the admission of parol evidence to alter the terms of written documents (R. 50).

A careful and thorough reading of the opinion of the trial Judge (R. 122-127), leaves the reader with the fixed impression that the Court determined the rights of Ellison solely upon the written contract between Northwest and Ellison (Ex. 3), as urged by the Appellee. That the Court did not consider the testimony of the witnesses is borne out throughout the opinion of which the following language is an example:

"Now wholly aside from the parol evidence rule, assuming for the sake of argument that all of the evidence admitted here concerning what Mr. Ellison thought about it and why they did this, that, and the other, assuming for the sake of the argument that all of that was admissible and should be taken in mind in interpreting this contract, even so I can't see how we can possibly get away from the terms of this contract (R. 123, 124)."

Having succeeded in persuading the Trial Court that he could not get away from the terms of the contract, by his insistence that the contract, and nothing but the contract, could be considered in determining the rights of the parties, the Appellee has now completely abandoned its position, and attempts to show

how the Trial Court could have reached the decision he did reach, by an entirely different route, which Appellee persuaded him he was not entitled to take. [1] Even were Appellee's present position on the facts well-taken, the complete abandonment of his theory below is enough in and of itself to justify a new trial, in which all of the evidence, parol as well as documentary, may be considered by the trier of fact. Cf. Landa v. Commissioner, 206 F. 2d 431 (D. C. Cir. 1953).

Appellee invites the Court of Appeals to ignore all evidence other than Exhibits 2 and 3, but Counsel quotes liberally from such parts of the evidence, as will, when lifted out of context support his contention that the parol evidence supported the findings of the Trial Court.

At page 26 of Appellee's Brief, he quotes the testimony of Eisenhower from which the Appellee concludes that Exhibit 3 "was designed to secure Northwest Door, not for the purchase price of the timber, but only for the repayment of the loans amounting to $100,000.00, which taxpayer *was* legally obligated to pay." At that point, an additional question is presented:

1 Appellee, even at this point, does not straightforwardly confess his error and admit outright that his position below was unsound, but rather backhandedly concedes the fact by stating that "it may possibly be" (Br. 22) that taxpayer is right, referring to the cases that so hold, and then making no attempt whatsoever to deny their applicability. He then goes on to discuss at great length the parol evidence, which the Court did not consider, as affording a basis for the result which the Court reached on entirely different and erroneous grounds.

a. If Mr. Eisenhower meant only to say that the contract was to secure Northwest for cash advances, why did he also say. ". . . and secondly, to see that Mr. Ellison delivered to Northwest Door the logs which Northwest Door wanted to use in its plywood plant" (R. 56).[2]

Appellee argues (pages 26, 27) that the security feature of the contract was only to secure repayment of cash advanced, not delivery of logs, quoting Mr. Eisenhower's testimony (R. 56) as authority for this conclusion.

Apparently, Appellee at this point completely capitulates, not only on the admissibility of the parol evidence, but also on the fact that the Appellant has conclusively established that the so-called "employment contract" (See Defendant's Contentions R. 16) is in reality a security device. What was secured, however, was clearly stated by both Eisenhower and Tenzler to be the return of the money to be advanced and a supply of logs (R. 38, 52, 56). Eisenhower also referred (in the portion of his statement omitted from quotation at page 26 in Appellee's Brief) to Vancouver Plywood as another party who was "going to advance the necessary

2 Compare this with Tenzler's testimony (R. 37) that Northwest could only use a certain grade of log, "peelers", in its plywood plant. Note the balance of Eisenhower's testimony (R. 56) that he received those instructions *before* the bid date, and that Ellison wanted not only to log the timber, but to *sell* the logs to Northwest (R. 60).

funds needed by him (Ellison) to purchase this timber and log it" (R. 56).

Appellee in quoting Eisenhower omits that portion of Mr. Eisenhower's testimony (quoted on page 26 of his brief) in which the witness explained the objectives he intended to accomplish when drafting the contract, Ex. 3. The testimony of the witness regarding Ellison's purpose in entering into the contract with Northwest continued:

> "A. He wanted to acquire certain timber to log and he needed financing to help do it and he came to Northwest Door to acquire that financing.
>
> Q. And what he wanted to do was to log it, let's be precise about that.
>
> A. He was in the logging business and he . . .
>
> Q. He wanted to log this timber, is that right?
>
> A. Yes, and sell us the logs."

Appellee ignores all of the testimony of Eisenhower and Tenzler other than the brief extracts quoted at page 26 and reaches the conclusion that, "The contract (Ex. 3) means what it says". The overall testimony of Tenzler and Eisenhower was that the objective of the contract (Ex. 3) was to secure Northwest in the event of a default.. This does not mean that the contract drawn by Eisenhower purported to describe the rights

of the parties for all purposes and it is perfectly clear from the testimony of the witnesses that it did not.

The Appellee asserts (Appellee's Br. 32) that a logger can never be a merchant, and that regardless of what the persons engaged in the logging industry may consider their occupation to be, Carlen v. Commissioner, 20 T. C. 573; affd. Carlen v. Commissioner, 220 F.2d 338 (9th Cir. 1955) have settled as a matter of law that anyone who calls himself a logger must be an employee. He misquotes Theodore Wall's definition of a logger (R. 87):

> "A logger is a man who goes out into the woods and acquires the timber and he builds his road and if he has got an engineering problem he solves the whole thing, puts the logs into the market. That is what I term a logger."

and overlooks the Court's finding (R. 25):

> "14. During the calendar years 1947 through 1949, inclusive, Robert F. Ellison was self-employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest."

Appellee continues by making the wholly erroneous assertion that there was no liability on the part of taxpayer to Northwest to reimburse it for logs cut but not delivered (Br. 25).

The agreement between Ellison and Northwest contained express provision that he would keep and save harmless the Northwest Door Company from any and all claims, demands, or liabilities of the United States Department of Agriculture (Ex. 3, Par. 4). This obviously includes any liabilities which Northwest might incur by reason of cutting timber belonging to the Forest Service. If Ellison failed to deliver such logs, he was nevertheless liable to Northwest on his contract for the purchase price.

Appellee asks the Court to consider an example of Ellison's position in the event that a load of logs were lost and concludes that taxpayer had no legal obligation to pay for the stumpage (Appellee's Br. 25). When questioned on this very point H. G. Reinsch testified (R. 91):

> "Q. Now state whether or not there was any agreement with Mr. Ellison for the absorption of any loss to logs that might occur before they were delivered into the custody of Northwest Door Company.
>
> A. Well, any loss that took place was too bad for Mr. Ellison.
>
> Q. What do you mean by that, Mr. Reinsch?
>
> A. He would be the loser.
>
> The Court: You mean you were only going to pay him for the logs he got to the dump?
>
> The Witness: Logs delivered to our points.

The Court: To your delivery points?
The Witness: Yes."

The Appellee apparently considers that this testimony meant that Ellison would lose only the amount due for what the Appellee terms compensation. In view of Ellison's contract to reimburse Northwest for any liability to the Forest Service, it is difficult to understand Appellee's contention that Ellison would not be compelled to pay Northwest for stumpage on any logs lost.

In this connection, it should be noted that Appellee, (in footnote 6, p. 25), erroneously states that the timber was paid for before the logs were cut. From examination of the contract with the Forest Service, it is apparent that what was required was a deposit in advance, similar to payment of the last month's rent, but that each load of logs was paid for as scaled, which could obviously not be done until the trees were cut and removed to the scaling points. See Ex. 2, §§ 2 (b), 6, 6 (a) 11; 36 CFR 221.13.

Not only does the Appellee quote the witnesses out of context; certain portions of the evidence are misinterpreted. For example, on page 29 of Appellee's Brief, a portion of Exhibit 7 is quoted:

> "As you know, on the Green Forks timber neither of us will make any gain or loss on the logs, as the contract has been turned over to Ellison. All we will receive are logs at current market prices."

Counsel says "All that Mr. Raknes (the author of the exhibit) meant was that inasmuch as taxpayer was receiving market price . . . for his services, Northwest Door would not make a profit on the logging operations." Counsel assumes that Mr. Raknes attached no meaning to the words "as the contract has been turned over to Ellison".

Counsel for Appellee contends that this memorandum, (Ex. 7), indicates that Northwest was considering transferring the Green Forks tract to Vancouver Plywood; this is not correct. From a cursory reading of the memorandum, it is apparent that Northwest desired to sell logs to Vancouver from timber owned by Northwest adjacent to Vancouver's holdings in exchange for the logs to be obtained from the Green Forks tract by Ellison and delivered to Northwest. It is interesting to note that on the tract owned by Northwest from which logs were offered to Vancouver, Northwest intended to employ a logger at a flat rate per thousand feet of logs. Also note that Northwest maintained two sets of logging accounts upon its records; one for the entry of the costs of loggers performing services, (R. 78), the other

for the costs of logs purchased, to which account~~s~~, the logs acquired from Ellison were charged (R. 78).

The Appellee cites certain correspondence between Northwest and the Forest Service as proof of Northwest's ownership. The Appellant does not deny that so long as Northwest remained on the bond with the Forest Service, the company's relationship was that of a guarantor. Appellee ignores the explanation of the witnesses regarding the purpose of the correspondence between Northwest and the Forest Service (Ex. A). The correspondence is fully explained as routine correspondence about which H. G. Reinsch (principal log buyer for Northwest at that time) would not necessarily have knowledge (R. 98). The testimony further shows in explanation, that it was written by Roy Ausserer regarding matters which were fully explained as relating to records maintained by Northwest because the company had sufficient personnel to perform the work.

Appellee having convinced the Lower Court that parol evidence was not admissible, now changes his position and suggests for consideration by this Court only such portions of the testimony as may, out of context, support his theory of the case. This proposal is inconsistent with the submission of the case to the Lower Court.

II

THE APPELLEE URGES THAT THE TAXPAYER MAY UNDER CERTAIN CIRCUMSTANCES IMPEACH A CONTRACT TO WHICH HE IS A PARTY, THE TAX COLLECTOR MAY AT HIS OPTION REJECT OR SUSTAIN THE TAXPAYER'S CONTENTIONS, BUT DOES NOT CLAIM THAT THIS RULE APPLIES TO THE INSTANT CASE.

For reasons which he fails to explain, Appellee cites cases relating to "sham" or "unreal" transactions, and asserts that the Commissioner is entitled to elect whether to sustain or disregard such arrangements. He does not appear to contend that this rule is any way applicable to the instant case, as it clearly is not. There is nothing "fictional" about the contract herein involved. It was a very real arrangement, entered into by the parties for security purposes, to protect the lender in the event of a default which fortunately never took place. The rights of the parties were carefully defined to see to it that Northwest would be damaged as little as possible if such a default occurred. To suggest that such an arrangement is "fictional" is to ignore both the evidence in the case and the practice of businessmen in handling security transactions since time immemorial. It is not apparent from Appellee's brief why this issue was raised. Since Appellee does nothing more

than mention the rule without attempting to claim that it is applicable herein, no further discussion of this point appears necessary.

III

THERE WAS A VALID ASSIGNMENT OF THE FOREST SERVICE CONTRACT TO ELLISON TO WHICH THE STATUTE OF FRAUDS DID NOT APPLY.

There is a basic misconception underlying much of the Appellee's argument. This misconception is that the Department of Agriculture contract is a conveyance of standing timber. Granting for the sake of argument that the Appellee is correct in his belief, the inhibition against assignment cannot be urged by the Tax Collector because:

(a) An oral contract unenforceable under the statute, is perfectly valid as between a party thereto and a third person. Corbin, Contracts, Vol. 2, § 289.

(b) The transaction between the Department of Agriculture, Northwest and Ellison was completely performed, and thus removed from the statute. Corbin, Contracts, Vol. 2, § 279 at page 22.

The point which Appellee fails to realize is that Northwest never had any legal title to the timber included in the Forest Service contract which it could

convey or sell. All that Northwest had was a contract right to cut the timber subject to the contract which it could and did assign.

Where there is an oral assignment of a contract which is recognized by the parties and the principal treats the assignee as the party in interest, the assignment is valid as against any third party including the Commissioner of Internal Revenue. Paxson v. Commissioner of Internal Revenue, (CA 3) 144 F.2d 772 (1944); The Hub, Inc., 3 B. T. A. 1259 (1925); Independent Aetna Sprinkler Co., 16 B. T. A. 521 (1929).

Appellee overlooks the uncontradicted testimony of all the witnesses in this case, none of whom with the exception of the Appellant himself, had any interest in the outcome of this proceeding. This testimony was that all parties treated Ellison as the owner of the contract right to cut the timber and of the logs obtained from the tract, which is in fact what he was.

Ellison agreed with Theodore Wall regarding the amount he would pay for the timber (R. 84, 85), and Northwest agreed to advance the funds needed by Ellison to purchase and harvest the timber (R. 56). When Northwest purchased the timber a resulting trust arose which is expressly excluded from the Statute of Frauds.

McSorley v. Bullock, 62 Wash. 140, 113 Pac. 279 (1911); Corbin, Contracts, Vol. 6, § 1461; Scott, Trusts (2d. Ed) § 448.

In his argument, Appellee ignores testimony of the witnesses that Ellison negotiated directly with the Forest Service regarding changes in the subject matter of the contract without consultation with Northwest. The contract (Ex. 2) provides for the cutting of timber on certain specified tracts (Ex. 2 § 1). The uncontradicted testimony in this case is that Ellison negotiated a substitution of other timber for that specified in the contract without prior approval of Northwest (R. 101, 110, 111).

The Forest Service contract also specifies that the main roads shall be located as designated on a map made part of the contract and where staked in advance by the Forest Service or approved in advance by the Forest Service Supervisor (Ex. 2, § 29). However, Ellison negotiated a change in the course of the main road directly with the Forest Service without discussion or prior approval of Northwest. The change in the location of the main roads also represents the act of a principal dealing for himself rather than a mere compliance by Ellison with the terms of his agreement "to bear the expenses of constructing and maintaining all roads

necessary for the removal of the timber" as the Appellee contend (Appellee's Br. 34).

The Appellee relies upon the provisions of the Forest Service contract relating to the placing of a duty upon Northwest for the protection of the Forest Service (Ex. 2). These sections relate to day-to-day performance of the contract:

15. Purchaser agrees to have at least twelve men and supervisory personnel available to Forest Officer in charge for the burning of slash. The testimony in this case is quite clear that the responsibility for fire control and the burning of slash as well as the requirements of the State relating to cleanup, was solely that of Ellison (R. 94, 95, 96).

He also refers to the following sections relating to day to day performance of the contract as indicative of the matters decided by the Forest Service in direct contact with the representative of Northwest:

15 (a) Construction of fire lines.
17. Assistance in fighting fires.
18. Smoking and lunch fire restrictions.
19. Burning of refuse.
20. Fire prevention.
24. Employment of fire foremen.
27. Keeping camps in a sanitary condition.

35. Shall have at main camp a representative authorized to receive any and all notices and instructions in regard to work.

The above listed conditions were the responsibility of Ellison who performed them (R. 92, 94, 95).

The Appellee urges that if Ellison's interest in the contract right to cut were primary and that of Northwest only for security purposes, Northwest would have sold Ellison the timber on a conditional sales contract, or transferred the timber to him and taken a mortgage back (page 29). As Appellee states on pages 6 and 19 of his brief, title to the timber was at all times in the United States until it was paid for (Ex. 2, §§ 2, 6, 11). Under the terms of this contract, it would have been impossible for anyone but the Department of Agriculture to sell the standing timber on a conditional sales contract or outright, taking a mortgage in return. He further overlooks that, under the arrangements drafted by Mr. Eisenhower, Northwest was amply secured. Appellee's footnote 8 is completely erroneous, Appellant never suggested that Eisenhower contemplated a mortgage on the timber, but a "loan on Ellison's equipment" (Appellants' Br. 14) or a chattel mortgage (Appellants' Br. 19).

Appellee states (Appellees Br. 27) that the fact that Northwest wanted to assure itself a supply of logs was

inconsistent with the transferring of ownership to the taxpayer, because in the event of a dispute taxpayer might have withheld the logs. This, of course, is precisely why the contract was drawn in the manner it was: So that in the event of a dispute taxpayer could not withhold the logs. This is exactly what Eisenhower meant when he said that he drew the instrument with the design of securing the supply of logs (R. 52). It is evident that if Northwest owned the logs, it would not have had to secure their supply by this instrument.

Appellee further argues that Ellison, as a prudent business man, would have obtained some written memorandum evidencing his primary ownership of the contract right to cut if it were really intended that ownership be transferred to him (Appellees Br. 28). It is elementary that a debtor does not dictate the terms under which credit is extended to him. He also overlooks what was demonstrated by the way in which this transaction was ultimately concluded . . . that both Ellison and Northwest were honorable business firms and trusted one another, and that their mutual trust and confidence was apparently well placed. If the fact that their transaction was not completely integrated in writing was good enough for them, it should be good enough for the Commissioner. No existing state or federal law prohibits citizens from keeping their bargain when not

reduced to writing. Even, if under the Statute of Frauds, an oral contract is valid as between a party thereto and a third person.

Appellee urges that the Appellant "will certainly have to prove beyond question that the contract (Ex. 3) was intended as something entirely different from what it purports to be. This statement is based upon two misconceptions:

(a) A misunderstanding of the rules governing burden of proof.

(b) The Court must consider the contract in a vacuum without reference to extrinsic evidence or testimony.

Neither the Congress, the Legislature of Washington, nor the evolving common law, has adopted the rule urged by the Appellee, that in civil cases (even against the sovereign) a plaintiff carries the same burden of proof carried by the sovereign in a criminal case; namely that of proof beyond a reasonable doubt.

The evidence in this case is uncontradicted that the Forest Service dealt directly with Ellison in matters relating to the substance of the contract. Northwest Door Co. consistently recognized that Ellison was the beneficial owner of the contract right to cut the timber,

and in carrying out the transaction at all times treated Ellison as the owner.

Exhibits 2, 3, and the balance of the agreement between the parties as adduced at the trial must be considered in *pari materia.* When this is done, it is quite apparent that Exhibit 3 represents only one part of the entire transaction, and is only an instrument in the nature of a bipartite trust receipt to provide security *it never became necessary to utilize.*

CONCLUSION

Appellants' position is fully stated in their opening brief, and need not be restated here. Appellee has apparently accepted our basic premise that the contract may not be construed in vacue, but must be considered with reference to the purposes which it was designed to accomplish. The abandonment of his theory below, on the basis of which the Trial Court was led to decide in his favor is sufficient in itself to justify the reversal of this case for a consideration of all of the relevant evidence. It should be apparent that having persuaded the Trial Court to disregard all of the parol testimony, the Appellee cannot prevail here on the basis that there is some parol testimony in the record that supports his theory.

All of the evidence in the record supports the assignment by Northwest to Ellison of the contract right to cut the timber and is consistent with the position that Ellison had equitable title to the logs, and only with that position. The unqualified and uncontradicted testimony of reputable and disinterested witnesses should be accepted by this Court. We submit that there can be no other conclusion from all of the evidence than that the judgment of the Court below should be reversed with directions to enter judgment in favor of taxpayer.

Respectfully submitted,

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APPENDIX

CODE OF FEDERAL REGULATIONS

Title 36 — Parks and Forests

Regulations relating to the protection, occupancy, use and administration of the National Forests — Secretary of Agriculture August 12, 1936, 1 F. R. 1092-1095.

36 § 221.13 Payments in advance of Cutting, Refunds and Transfers.

No timber shall be cut under any sale contract until it has been paid for. Refunds may, in the discretion of the Chief of the Forest Service or Regional Forester, be made to depositors or to their legal representatives of sums deposited in excess of amounts due the United States. Refunds of payments may also be made to the rightful claimants of sums erroneously collected for timber or other forest products. (34 Stat. 1270, 36 Stat. 1253; 16 U.S.C. 499 (Reg. S-13). ~~1949 Amendment.~~